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Supreme Court, U.S.
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No. 85-1459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant,

v.

RUTH ANN POWELL,

Appellee.

On Appeal From The Court of Appeals of Texas for the Tenth Supreme Judicial District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Did Congress intend by its enactment of the Uniformed Former Spouses Protection Act, 10 U.S.C. ss 1408, to retroactively remove the preemption established under prior federal law as interpreted in *McCarty v. McCarty*, 453 U.S. 210 (1981), thereby nullifying this Court's decision in *McCarty* and replacing the preemptive federal statutes with state community property statutes which redefine Appellant's property interests in military retirement pay established at the time of a 1965 divorce?

2. Is the application of Texas community property and partition laws to a 1965 divorce, whereby military retirement benefits became solely vested in Appellant under prior federal law and by a final judgment based on such law, repugnant to the Constitution and laws of the United States?

3. Does the application of current Texas law to property rights vested under prior federal law and by final judgment result in a divestiture of such rights and a deprivation of defenses related to such rights so as to constitute a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

4. Did the award of a money judgment and an award of forty-six percent of Appellant's military retirement benefits to Appellee constitute a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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On Appeal From The Court Of Appeals of Texas For The Tenth Supreme Judicial District

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MOTION TO DISMISS OR AFFIRM

Appellee Ruth Ann Powell respectively moves to dismiss the appeal of James H. Powell, or alternatively, to affirm the opinion and judgment of the Courts below.

The basis of this suit is whether Texas Courts are entitled to apply Texas community property law to divide military retirement benefits in divorce proceedings.

QUESTIONS BEFORE THE COURT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

2. The doctrine of res judicata as applied by Texas Courts is not repugnant to the Constitution and laws of the United States.

3. The application of Texas community property law by Texas Courts is not repugnant to the Constitution and laws of the United States.

4. USFSPA nullifies the effect of the McCarty decision and permits state courts to deal with military retirement benefits in accordance with local law.

5. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257(2), claiming that the Texas Community property statutes and Texas property law have been applied to the facts of this case in a manner he alleges is repugnant to the laws of the United States. For jurisdictional authority, appellant relies upon *McCarty v. McCarty*, 453 U.S. 210 (1981).

This Court in *McCarty* acquired jurisdiction in that case because the federal military retirement benefits statute then in existence pre-empted state community property laws and therefore state divorce courts were precluded by the Supremacy Clause from dividing such benefits. 453 U.S. at 219 n. 12.

In acquiring jurisdiction this Court determined that the federal retirement statutes conflicted with state community property rights; and that the state community property rights, as applied, injured the objectives of the federal retirement program as it then existed. Ibid at 232.

The crucial fact distinguishing the present case is that Congress enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408 AFTER the decision in *McCarty*. By this legislation, Congress has specifically granted to state divorce courts that authority which McCarty pre-empted them from exercising. Therefore, no conflict exists between state and Federal laws. The jurisdictional basis asserted by Appellant, namely, that the community property laws are repugnant to the Federal retirement laws, no longer exists.[1]

The principal entitlement of former spouses is set forth in Section 1408(c)(1) of the act:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as prop-

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[1] This Court denied a Petition for Certiorari in a case involving similar questions to the instant case. *Jett v. Jett*, 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 U.S. 2215 (No. 84-1375, April 22, 1985).

> erty solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This Court predicted in *McCarty* that, "Congress may well decide . . . that more protection should be afforded the former spouse of a retired servicemember. This decision, however, is for Congress alone". 453 U.S. at 235.

Appellant's arguments that the Texas Courts have misinterpreted federal law are incorrect. The newly enacted USFSPA set up a system where each state court now divides retirement benefits in accordance with the law of the jurisdiction of that state. A state court facing a division of military retirement benefits does not look to federal law to determine how the retirement benefits are to be divided, but to the laws of the state.

Appellant also argues that the judgment imposes a retroactive application of section 3.63(b)(1) of the Texas Family Code. No authority is cited in Appellant's Statement of Jurisdiction supporting his claim that the judgment in question is repugnant to and a violation of the takings and due process clauses of the Fifth and Fourteenth Amendments. *Cameron v. Cameron*, 641 S.W. 2d 210 (Tex. 1982) at 220 decided that the property spouses acquire during marriage, except by gift devise or descent should be divided as community property, irrespective of the domicile of the spouses when they acquire the property. The Texas Supreme Court in it's rationale did consider section 3.63(b)(1) of the Texas Family Code, together with an exhaustive anaylsis of the common law of various jurisdictions. The holding in *Cameron*, applied

to the present case, is not an improper application of Texas law.

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

[See brief of argument under I., supra.]

2. The doctrine of res judicata as applied by Texas Courts is not repugnant to the Constitution and laws of the United States.

The Court below correctly decided the res judicata issue in holding that the enactment of the USFSPA "created a new fact, a change in the law and a new cause of action." The Court decided that under Texas common law, the doctrine of res judicata did not apply to the facts of this case. In Texas, the judgment in a prior case was res adjudicata only of the issue then presented of the facts as they then appeared *and of the legislation then existing.' State v. Powell*, 134 SW2d 746, 748 (Tex. Civ. App. 1910, writ ref'd), quoting *Utter v. Franklin*, 172 U.S. 416 (1899) (emphasis added). See also *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

Appellant incorrectly argues that *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981) should be followed. In that case, Moitie failed to perfect an appeal from the first order dismissing his federal claim. During the appeal of his co-plaintiffs, this Court modified prior law. Moitie filed a state law claim which this Court decided was not barred by the prior federal dismissal. Appellant argues that the rationale in *Moite* should be followed, when the holding was that state

court claims are not barred by a dismissal of federal claims.

The factual situation of the present case is complicated, and does present new issues as to whether res judicata should be applied. Under the USFSPA, state courts are to apply the law of the local jurisdiction to division of military retirement benefits. The Texas courts have ruled in favor of Appellee, and said decisions are not repugnant to Constititutional provisions. If Mrs. Powell had waited to file her initial suit for partition after the enactment of the USFSPA, the defense of res judicata would not have been asserted. Appellant argues that because Mrs. Powell's first case fell into the "gap" between *McCarty* and the enactment of the USFSPA, that she is barred from relief to which she would be entitled if she had waited until after *McCarty* and the USFSPA to file her suit for partition.

> 3. The application of Texas community property law by Texas Courts is not repugnant to the Constitution and laws of the United States.

Appellant argues that Congress did not intend, and that the law does not permit, the "reopening" of court orders decided prior to McCarty, the present action is not a suit "to reopen" in the usual sense of that word. This is a *partition* action, which, in its very essence, does not seek to "reopen" a prior order or case. The theory of a partition action in the context of divorce is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tenants-in-common, they are entitled to seek a subsequent partition of their co-tenant estate. A partition action has always been regarded under

Texas law as something quite distinct from a bill of review or other action seeking to reopen or modify a prior judgment.

Appellant's argument that he is the victim of a retroactive application of partition actions based on an anaylsis of *Cameron v. Cameron*, 641 S.W. 2d 210 (Tex. 1982) are incorrect. *Cameron* arose before the effective date of section 3.63(b)(1) of the Texas Family Code. That section was considered but was not dispositive of the holding in that case.

> 4. The construction of the USFSPA by the Texas courts, applying Texas law, does not create an improper retroactive judgment repugnant to prior federal law and the Constitution and laws of the United States.

Appellant argues that the lower court has created a retroactive judgment. This is not true. Appellee in her second suit sought relief only within the rights created by the USFSPA. Appellee made no claims for relief from the date of the original divorce action to the effective date of the USFSPA. Appellee did not seek any retroactive relief, and none was granted.

The Court in *Trahan v. Trahan*, 682 SW2d 332, 334 (Tex. Ct. App.—Austin, 1984, writ ref'd n.r.e.), citing *Cameron v. Cameron*, 641 SW2d 210, 212 (Tex. 1982). correctly held that the purpose of the USFSPA is to reverse the effect of the *McCarty* decision.

The holding in this case and *Trahan* is amply supported by the legislative history. The opinion in *Trahan* quotes extensively from Senate Report No. 502, *Trahan v. Trahan*, supra, p.335, which includes the following observation:

> The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what is was when the courts were permitted to apply state divorce laws to military retired pay.

Most of the state courts which have construed the USFSPA have reached the same conclusion. See, for example, *In re Marriage of Hopkins*, 191 Cal. Rptr. 70 (Cal Ct. App. 1983); *Smith v. Smith*, 458 A2d 711 (Del. Fam. Ct. 1983); *Walentowski v. Walentowski*, 672 P2d 657 (NM 1983); *De Gryse v. De Gryse*, 661 P2d 185 (Ariz. 1983); *In re Smith*, 669 P2d 448 (Wash. 1983); *Castiqlioni v. Castiglioni*, 471 A2d 809 (N.J. Super. 1984); *Jett v. Jett*, 449 So.2d 557 (La. Ct. App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (No. 84-1375, April 22, 1985).

The two cases cited in Appellant's Jurisdictional Statement, *Moller v. Moller*, 356 NW2d 909 (S.D. 1984) and *Bishir and Britt v. Bishir*, 698 S.W. 2d 823 (Ky. 1985), do not take a contrary view. Both of these cases involved a request to reopen divorce judgments final before the *McCarty* decision. The Courts declined to do so, but solely on the basis of local law, not on the basis of any construction of the USFSPA or *McCarty*.

Appellant makes various complaints about the way in which the Texas court applied its community property law. In so doing, Appellant misses a fundamental thrust of the USFSPA, which is that a state "court may treat disposable retired or retainer pay . . . *in accordance with the law of the jurisdiction of such court*." 10 U.S.C. Section 1408(c) [italics added]. the

legislative history makes clear that "The provision is intended to remove the federal pre-emption found to exist by United States Supreme Court and permits State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable." Senate Report No. 502, quoted in the opinion below, 682 SW2d at page 335.

This also disposes of Appellant's complaint that the decisions of some states are in conflict. The USFSPA permits diverse treatment "in accordance with local law". Section 1408(c) (1). This Court has repeatedly recognized that "the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1980), quoted in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and in *McCarty*, 453 U.S. 210, 212.

Appellant also argues that, even if *McCarty* is no longer effective today, it still has retroactive effect prior to 1981. To the contrary, Congress obviously intended that the USFSPA should nullify *McCarty* altogether.(2) This is apparent from the basis entitlement section, Section 1408(c)(1), quoted above. The Section selects as the beginning date June 25, 1981 which was the day prior to the date on which the decision in *McCarty* was handed down.

Virtually every court which has addressed the issue of whether *McCarty* was intended to be retroactive, has held that it is not retroactive, many cases so holding even before the USFSPA had passed. *Segrest v. Segrest*, 649 SW2d 610 (Tex. 1983); *McGinn v. McGinn*, 337 NW 2d 632 (Mich. Ct. App. 1983); *Erspan v. Badgett*, 659 F2d 26 (5th Cir. 1981); *Rodriquez*

v. Rodriquez, 133 Ariz. 88, 649 P2d 291 (Ariz. Ct. App. 1982); *In re Marriage of Fellers*, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (Cal. Ct. App 1981); *In re Marriage of Allcock*, 107 I11. App. 3d 150, 62 Ill. Dec. 865, 437 Ne2d 392 (I22. Ct. App. 1982); *Whenry v. Whenry*, 652 P2d 1188 (N.M. 1982); *In re Marriage of Vinson*, 644 P2d 635 (Ore Ct. App. 1982).

5. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

Appellant argues that the lower courts decision improperly divests him of rights contrary to the Fifth and Fourteenth Amendments. It has long been held by both Federal and Texas courts that a government pension is a "public right", and that a public employee has no vested rights in the statutory pension. *Dodge v. Board of Education*, 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937); *Stouper v. Jones*, 284 F2d 240 (D.C. Ct. App. 1960); *Dallas v. Trammell*, 129 Tex. 150, 101 SW2d 1009 (Tex. 1937).

Appellant had no exclusive property right in his military retirement benefits at the time of his divorce in 1963. Under Texas law, military retirement benefits were community property at that time. *Kirkham v. Kirkham*, 335 SW2d 393 (Tex. Ct. App.—San Antonio, no writ).

The only case cited by Appellant is *U.S. v. Larionoff*, 431 U.S. 864 (1977). In *Larionoff*, this Court held that naval personnel were entitled to re-enlistment bonuses based upon regulations in effect at the time they signed a re-enlistment agreement with the Navy, despite the fact that the Navy subsequently changed the terms of the bonus by regulation. It is

important to note that the decision in *Larionoff* (a narrow 5-4 vote), turned on the fact that the benefit involved, a re-enlistment bonus, was based upon a specific re-enlistment agreement between the government and the particular servicemen involved, which created contractual rights. In addition, this Court expressly declined to base its holding on any constitutional grounds, but rather based the decision on a construction of congressional intent. The Federal Courts of Appeals have upheld the action of Congress in altering government pension rights on several occasions. *Stouper v. Jones*, 284 F2d 240 (D.C. Ct. App. 1960); *Costello v. United States*, 587 F2d 424, 426 (Ct. App.—9th Cir., 1978), cert. den., 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed. 2d 296 (1979).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this appeal should be dismissed or alternatively, that the judgment of the lower courts below be affirmed.

Respectfully submitted,

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